

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

**CIVIL SERVICE COMMISSION
One Ashburton Place: Room 503
Boston, MA 02108
(617) 727-2293**

MICHAEL DEALMEIDA,
Appellant

v.

D-13-209

FALL RIVER PUBLIC SCHOOLS,
Respondent

Appearance for Appellant:

Phillip Brown, Esq.
Associate General Counsel
AFSCME Council 93
8 Beacon St, 7th Floor
Boston MA 02108

Appearance for Respondent:

Bruce A. Assad, Esq.
16 Bedford Street
Fall River MA 02720

Commissioner:

Paul M. Stein

DECISION

The Appellant, Michael DeAlmeida, acting pursuant to G.L.c.31, §§ 41-43, duly appealed the decision of the Fall River Public Schools, Appointing Authority (FRPS), suspending him for three (3) days from his position as Junior Custodian. A full hearing was held at the UMass School of Law in Dartmouth on December 6, 2013. The hearing was declared private. Witnesses were sequestered. The hearing was digitally recorded and copies were sent to the parties. Both parties submitted proposed decisions to the Commission.

FINDINGS OF FACT

Eleven (11) exhibits were entered into evidence at the hearing. Based upon these exhibits, the testimony of the following witnesses:

Called by the Appointing Authority:

- Joseph Correia, FRPS Director, Administrative & Environmental Services
- James Medeiros, FRPS Assistant Director, Administrative & Environmental Services
- Charles Pelletier, FRPS Senior Custodian
- Tina Guinta, FRPS Safety Officer

Called by the Appellant:

- Mark Costa, FRPS, School Committee Member
- Michael DeAlmeida, Appellant

and reasonable inferences from the credible evidence, I make the following findings of fact:

1. The Appellant, Michael DeAlmeida, is a permanent civil service employee of the FRPS, who holds the position of Junior Custodian. For approximately the past three years, Mr. DeAlmeida was assigned to the Talbot Middle School and worked under the direct supervision of Charles Pelletier, the Senior Custodian at that school. (*Testimony of Appellant*)

2. Mr. DeAlmeida's regularly assigned duties include cleaning the cafeteria and one stairwell, as well as grounds work and other custodial assignments as required. His performance reviews generally rated him above average in quality of work. (*Exhs. 8 & 9; Testimony of Appellant*)

3. Mr. DeAlmeida received the following prior discipline during his eleven (11) years of tenure with the FRPS:

- June 9, 2003 – written warning for insubordination;
- March 26, 2014 – two-day suspension for insubordination;
- October 1, 2008 – verbal warning for inappropriate statements
- February 12, 2013 – written warning for a verbal and physical confrontation
- June 3, 2013 – verbal warning for tardiness

(*Exhs. 1 through 5*)

4. In the time frame involved, the Principal at the Talbot Middle School is Mrs. Elizabeth Coogan, who is married to Thomas Coogan, the FRPS Director of Operations. Principal Coogan did not testify at the Commission hearing. (*Testimony of Correia*)

5. Mr. DeAlmeida's son was a student at the Talbot Middle School during the school year 2012 – 2013. During the early part of the school year, there had been some turnover in the teachers assigned to Mr. DeAlmeida son's class and Mr. DeAlmeida son had complained that he was not learning what he needed to be able to pass the MCAS exam later that year. At some point during the year, however, a relative of Principal Coogan was assigned to teach math to the class and Mr. DeAlmeida noticed considerable improvement in his son's progress. (*Testimony of Appellant & Costa*)

6. In March 2013, when FRPS Superintendent of Schools came to learn that the relative of Principal Coogan had been assigned to the Talbot Middle School, the teacher was removed from the school. This change upset Mr. DeAlmeida, who spoke about it to Mark Costa, the Vice-Chair of the School Committee, who also was a neighbor. Mr. Costa, in turn, spoke to Principal Coogan and, later, the Superintendent. (*Testimony of Appellant & Costa*)

7. Within a day or two after Mr. Costa's first conversation with Mr. DeAlmeida, Principal Coogan approached Mr. DeAlmeida about his contact with Mr. Costa. Mr. DeAlmeida told Mr. Costa that Principal Coogan's demeanor during this conversation was unprofessional. Mr. Costa passed along this concern to the Superintendent. (*Testimony of Appellant & Costa*)

8. Mr. DeAlmeida had an excellent personal and working relationship with Principal Coogan which he believed began to sour after this incident involving her relative who had been removed from his assignment as his son's math teacher. (*Testimony of Appellant*)

9. On June 12, 2013, Principal Coogan noticed that the areas assigned to Mr. DeAlmeida, specifically, the cafeteria, had not been properly cleaned. She spoke to Mr. Pelletier who directed Mr. DeAlmeida to clean the cafeteria floor which he did. (*Exh. 10; Testimony of Appellant & Pelletier*)

10. The next day, June 13, 2014, Mr. DeAlmeida reported for duty, as usual, at 6:45 am. He opened the cafeteria for breakfast and monitored the cafeteria “for spills” until 7:15 am, when breakfast ended. He then put on his boots, took out the trash and began “weed-wacking” outside the school building. I infer, from his testimony, that, after breakfast and prior to beginning his outside grounds work, Mr. DeAlmeida did not wash the cafeteria floor, as he claimed it did not need it. (*Testimony of Appellant*)

11. Later that morning, Principal Coogan informed Mr. Pelletier that she wanted the cafeteria floor and the stairs assigned to Mr. DeAlmeida cleaned before lunch. Mr. Pelletier directed Mr. DeAlmeida that he needed to do so. (*Exh. 10; Testimony of Appellant & Pelletier*)

12. Mr. DeAlmeida did vacuum the stairway as required, but he objected to the assignment to wash the cafeteria floor. Mr. Pelletier offered to help Mr. DeAlmeida wash the cafeteria floor, which was about a 25 minute job. He stated that there was no reason to wash the whole floor because all it needed was spot mopping, he would have to wash the floor again after lunch, and he wasn’t going to do it twice. (*Exh. 10; Testimony of Appellant & Pelletier*)

13. After Mr. Pelletier left the cafeteria, Mr. DeAlmeida did “spot mop” a small part of the cafeteria floor. At some point, Mr. DeAlmeida took one of the plastic cafeteria food trays and threw it against the wall, causing a loud bang that was noticed by cafeteria staff and the Talbot School Security Officer, Tina Guinta. (*Testimony of Appellant & Guinta*)

14. Ms. Guinta reported the incident to Principal Coogan and they, together with Mr. Pelletier, came to the cafeteria area to speak with Mr. DeAlmeida. Mr. DeAlmeida refused to speak with them, said he wanted a union representative present, and walked away. (*Testimony of Appellant, Pelletier & Guinta*)

15. Principal Coogan directed Mr. Pelletier to report the incident to his superiors, James Medeiros and Joseph Correia, who came to the school, spoke with Principal Coogan and Mr. DeAlmeida, and took written statements from Mr. Pelletier and Ms. Guinta. (*Exhs. 10 & 11; Testimony of Appellant, Pelletier, Guinta, Medeiros & Correia*)

16. On June 19, 2013, Mr. Correia informed Mr. DeAlmeida that he was being suspended for three days for insubordination based on his conduct on June 13, 2013 and ordered to attend an Employee Assistance Program for anger management. Following a hearing on June 27, 2013, the suspension was affirmed by letter dated August 31, 2013. This appeal duly ensued. (*Exhs. 6 & 9: Claim of Appeal*)

Applicable Law

Under G.L.c.31,§43, a tenured civil service employee aggrieved by a disciplinary decision of an appointing authority made pursuant to G.L.c.31,§41, may appeal to the Commission. The Commission has the duty to determine, under a “preponderance of the evidence” test, whether the appointing authority met its burden of proof that “there was just cause” for the action taken. G.L.c.31,§43. See, e.g., Town of Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823, (2006); Police Dep’t of Boston v. Collins, 48 Mass.App.Ct. 411, rev.den., 726 N.E.2d 417 (2000); McIsaac v. Civil Service Comm’n, 38 Mass App.Ct.473,477 (1995); Town of Watertown v. Arria, 16 Mass.App Ct. 331,334, rev.den.,390 Mass. 1102 (1983).

“Just cause” for discipline means "whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of public service." School Comm. v. Civil Service Comm’n, 43 Mass. App. Ct. 486, 488, rev.den., 426 Mass. 1104 (1997); Murray v. Second Dist. Ct., 389 Mass. 508, 514 (1983) An action is "justified" if "done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law." Commissioners of Civil Service v. Municipal Ct., 359 Mass. 211, 214 (1971); City of Cambridge v. Civil Service Comm’n, 43 Mass.App.Ct. 300, 304, rev.den., 426 Mass. 1102 (1997); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928)

It is the purview of the hearing officer to determine the credibility of the testimony presented through the witnesses who appear before the Commission. See, e.g., Leominster v. Stratton, 58 Mass.App.Ct. 726, 729 (2003) See also Covell v. Dep’t of Social Services, 439 Mass. 766, 787 (2003); Doherty v. Retirement Bd. Of Medford, 425 Mass. 130, 141 (1997); Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm’n, 401 Mass. 526, 529 (1988)

G.L.c.31, Section 43 also vests the Commission with “considerable discretion” to affirm, vacate or modify a penalty imposed by the appointing authority, albeit “not without bounds”. Police Comm’r v. Civil Service Comm’n, 39 Mass.App.Ct. 594,600 (1996) and cases cited; Faria v. Third Bristol Div., 14 Mass.App.Ct. 985, 987 (1982) (remanded for findings to support modification) The power accorded to the commission to modify penalties must not be confused with the power to impose penalties ab initio, which is a power accorded to the appointing authority. Falmouth v. Civil Service Comm’n, 61 Mass.App.Ct. 796, 800 (2004) Unless the Commission’s findings of fact differ materially and significantly from those of the appointing authority or interpret the relevant law in a substantially different way, the commission is not free

to “substitute its judgment” for that of the appointing authority, and “cannot modify a penalty on the basis of essentially similar fact finding without an adequate explanation.” See, e.g., Town of Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823 (2006) and cases cited (minor, immaterial differences in factual findings by Commission and appointing authority did not justify modification of 180 day-suspension); Commissioner of MDC v. Civil Service Comm’n, 13 Mass.App.Ct. 20 (1982) (discharge improperly modified to 20-month suspension); Town of Watertown v. Arria, 16 Mass. App. Ct. 331, 334, rev.den., 390 Mass. 1102, (1983) (commission improperly overturned discharge without substantial evidence or factual findings)

Analysis

The FRPS had just cause for imposing discipline upon Mr. DeAlmeida for his substantial misconduct on June 13, 2013. Mr. DeAlmeida was directed to clean the cafeteria floor by his superior, Senior Custodian Charles Pelletier. Not only did he fail to comply with this directive, he showed his anger at being ordered to comply by engaging in an entirely inexcusable display of workplace violence.

Mr. DeAlmeida’s job duties as Junior Custodian required his full compliance with assignments, especially, specific assignments made by his supervisor to maintain cleanliness. While he may have some discretion as to when and in what manner to perform his assigned duties on a daily basis, he does not have discretion to disregard a proper, express directive just because he disagrees with it. In particular, Mr. DeAlmeida apparently believed, on the morning of June 13, 2013, that it was appropriate to leave the cafeteria without mopping the floor so that he could begin “weed-wacking” the grounds instead. Whatever sound judgment that choice may have represented, initially, he had no cause to persist in his “grounds work” over cleaning the cafeteria floor upon being explicitly ordered to prioritize the cafeteria task instead.

I do not find credible Mr. DeAlmeida's claim that Principal Coogan was harassing him with unnecessary work in retaliation for his efforts to keep Principal Coogan's son employed as Mr. DeAlmeida's math teacher. The circumstances of that incident fail to persuade me that it could have been the cause of any persistent acrimony between Principal Coogan and Mr. DeAlmeida. There simply is no credible evidence of any nexus between that incident in March 2013 and the state of cleanliness in the cafeteria three months later.

I do have some concern that Principal Coogan did not testify at the Commission hearing, as she would have been the best percipient witness to many of the facts that were contested here, particularly, what she saw on June 13, 2013, after breakfast, that caused her to order the entire cafeteria floor cleaned. As to the other issues, however, even if Mr. DeAlmeida's version of his encounters with Principal Coogan as "on fire" were true, it would not be sufficient to justify his own, insubordination and workplace violence toward Mr. Pelletier that formed the basis for his discipline (and occurred out of Principal Coogan's presence) or warrant any modification of the three-day suspension imposed for that misconduct under the circumstances of this case.

CONCLUSION

For the reasons stated herein, the appeal of the Appellant, Michael DeAlmeida, filed under Docket No. D-13-209 is hereby *denied*.

Civil Service Commission

/s/ *Paul M. Stein*

Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, McDowell & Stein, Commissioners) on January 22, 2015.

Either party may file a motion for reconsideration within ten days of the receipt of this Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(1), the motion must identify a clerical or mechanical error in this order or decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of this Commission order or decision.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by this Commission order or decision may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of this order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of this Commission order or decision.

Notice to:

Philip Brown, Esq. (for Appellant)

Bruce A. Assad, Esq. (for Respondent)